Adiswaran a/l Tharumaputrintar v Public Prosecutor and other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–314–11 OF 2011(B), 05–315–11 OF 2011(B), 05–316–11 OF 2011(B) AND 05–317–11 OF 2011(B)
RICHARD MALANJUM CHIEF JUSTICE (SABAH AND SARAWAK), ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND ZALEHA ZAHARI FCJJ
5 FEBRUARY 2014

Criminal Law — Murder — Appeals against conviction and sentence — Whether identity of deceased had been proven — Circumstantial evidence — Whether trial judge erred in convicting appellants in reliance on wholly circumstantial evidence — Whether appellate court should disturb findings of fact — Common intention — Whether there was sufficient circumstantial evidence to prove second, third and fourth appellants were confederates of first appellant

Criminal Procedure — Trial — Statements — Refreshing memory — Whether trial judge erred in allowing prosecution witnesses to refresh their memories by referring to their statements to police

Evidence — Adverse inference — Whether failure fatal to prosecution's case — Whether prosecution intended to suppress evidence — Inconsistencies in testimonies of prosecution witnesses — Whether trial judge erred in accepting parts of their evidence — Identification — Whether identification parades were conducted in accordance with procedure — Whether there was confusion as to identification of second, third and fourth appellants

Manivanan s/o Vellayasamy ('the deceased'), an Indian national, had run away with one Jayanthi d/o Vadiveloo ('Jayanthi'). On 9 August 2004, the deceased was seen in the company of Mainthan s/o Arumugam ('the first appellant') before he went missing. On 10 August 2004, the police discovered a dead body cut into six parts that was identified by Jayanthi to be the deceased. The postmortem carried out on the body parts showed that the cause of death was multiple slash wounds to the head. The evidence of the fingerprint expert, who made the fingerprint comparison, was that the fingerprints matched that of an Indian national by the name of Kalidash s/o Arumugam. The prosecution submitted that the deceased and Kalidash s/o Arumugam was the same person. It was the prosecution's case that the first appellant together with three others ('the appellants') had caused the death of the deceased in furtherance of a

common intention. The second and third appellants worked for the first appellant, while the fourth appellant was their friend. The four appellants were charged for the offence of murder under s 302 of the Penal Code. The prosecution adduced evidence that the deceased was last seen in the company of the first appellant in his house. The first appellant's tenant (PW19) testified that on 9 August 2004, he had seen the deceased lying dead with a severed head on the floor of the first appellant's premises. PW19 also stated that the first appellant who was in the room at that time had threatened PW19 not to report the matter to the police.The appellant's colleague ('PW10') who had entered the first appellant's premises during the material time to drink liquor also claimed to have seen a body lying in the appellant's premises. PW10 also testified that he had seen the first appellant holding a knife, while the third appellant was holding a *parang*. The knife and *parang* were recovered by the police based on information given to them by the first appellant. The prosecution submitted that it had proved that the first appellant was holding a knife and the third appellant a *parang* in the presence of the second and fourth appellants, while all four appellants were near the deceased, who was lying down on the floor with head injuries. The trial judge made a finding that the dead body cut into six parts belonged to the deceased and that based on the evidence the prosecution had made out a prima facie against the four appellants. The four appellants denied any involvement in the death of the deceased but the trial judge found that the defence had not raised any reasonable doubt in the prosecution's case. Consequently the four appellants were convicted and sentenced to death. Their appeals were dismissed by the Court of Appeal and hence the present appeals. The appellants submitted, inter alia, that the identity of the deceased as per the charge had not been proven, that the evidence of the prosecution's key witnesses was unreliable and ought to be rejected and that the Court of Appeal had failed to appreciate the issue of identification and the manner in which the identification parades had been carried out.

Held, dismissing the first appellant's appeal and allowing the appeals of the second, third and fourth appellants:

(1) It is trite that an appellate court would not interfere with the concurrent findings of fact of the courts below in the absence of very special circumstances. On the totality of the evidence adduced, the courts below were correct in their findings as to the identity of the deceased. As such, the appellants' argument that the identity of the deceased as per the charge had not been proven was devoid of any merit (see paras 45–46).

(2) On the facts of this case the adverse inference under s 114(g) of the Evidence Act 1950 was not applicable and should not be invoked against the prosecution for its failure to produce and call Jayanthi as its witness. The investigating officer had made various efforts to trace Jayanthi but to no avail. As such there clearly was no intention on the part of the

prosecution to suppress the evidence. In any case, the trial judge was of the view that even without the evidence of Jayanthi there was sufficient evidence to prove the identity of the body parts to be that of the deceased. Thus, the failure to call Jayanthi as a witness was not fatal to the prosecution's case (see para 47).

(3) The appellants' contention that the trial judge had erred in allowing PW10 and PW19 to refresh their memories by referring to their respective statements under s 112 of the CPC was without merit. There was no general rule that a witness was to be allowed to refresh his memory only when his memory was faded. It was within the trial court's discretion to allow a witness to refresh his memory. It was the duty of the trial judge to ensure that the court would not be deprived of the full testimony and information, which it should have in order to do justice. Further PW10 and PW19 gave evidence after a lapse of about five years after the incident (see paras 51, 62 & 67).

(4) On the issue of the contradictions in the evidence of PW10 and PW19, the trial judge had scrutinised with great care the evidence of these two witnesses before accepting those parts of their evidence that were consistent with their statements to the police. It is trite law that if there were discrepancies in a witness's testimony, this did not necessarily make him an unreliable witness or make the whole of his evidence unacceptable. Instead, it was the duty of the court to sieve through the evidence and to ascertain which part of the evidence incriminating the accused could be accepted. Thus, the trial judge had not erred in accepting parts of the evidence of PW10 and PW19 (see paras 70–71).

(5) The police officer in charge of conducting the identification parades had tendered reports in court, which showed that he had complied with the directions under 'IGSO' relating to the height, age, race and appearance of the participants who took part in the identification parades. Further, this police officer had not been challenged by the defence on this issue when he was cross-examined. As such, on the evidence available it was clear that the identification parades had been properly conducted and there was no confusion as to the identification of the second, third and fourth appellants (see paras 72 & 76).

(6) In respect of the first appellant, it was clear that the circumstantial evidence could only give rise to one conclusion, ie that it was the first appellant who caused the death of the deceased. The evidence had established that the deceased was last seen in the company of the first appellant in his place and that the knife and *parang* were recovered by the police based on the information given by the first appellant to the police. Further, the trial judge was correct in rejecting the defence of the first appellant (see paras 82 & 85).

(7) At the end of the prosecution case, there was insufficient circumstantial evidence to prove that the second, third and fourth appellants were present at the scene of the crime as confederates of the first appellant. As the prosecution had failed to establish a prima facie case against the second, third and fourth appellants at the end of the prosecution's case based on a maximum evaluation of the evidence, their defence should not have been called (see paras 86–87).

[Bahasa Malaysia summary

Manivanan a/l Vellayasamy ('si mati'), seorang warga India, telah melarikan diri bersama Jayanthi a/p Vadiveloo ('Jayanthi'). Pada 9 Ogos 2004, si mati dilihat bersama Mainthan a/l Arumugam ('perayu pertama') sebelum dia hilang. Pada 10 Ogos 2004, polis menjumpai mayat yang telah dipotong enam bahagian yang dikenalpasti oleh Jayanthi sebagai si mati. Postmortem yang dijalankan ke atas mayat itu menunjukkan bahawa sebab kematian adalah kerana beberapa luka dikelar di bahagian kepala. Keterangan pakar cap jari, yang membuat perbandingan cap jari, adalah bahawa cap jari itu sepadan dengan warga India bernama Kalidash a/l Arumugam. Pendakwaan berhujah bahawa si mati dan Kalidash a/l Arumugam adalah orang yang sama. Ia adalah kes pendakwaan bahawa perayu pertama bersama tiga yang lain ('perayu-perayu') telah menyebabkan kematian si mati dalam melaksanakan niat bersama. Perayu-perayu kedua dan ketiga bekerja untuk perayu pertama, manakala perayu keempat adalah kawan mereka. Keempat-empat perayu itu telah dituduh kerana kesalahan membunuh di bawah s 302 Kanun Keseksaan. Pendakwaan telah mengemukakan keterangan bahawa si mati telah dilihat kali terakhir bersama perayu pertama di rumahnya. Penyewa rumah perayu pertama ('PW19') telah memberi keterangan bahawa pada 9 Ogos 2004, dia telah melihat si mati yang mati terbaring dengan kepala terputus di atas lantai premis perayu pertama. PW19 juga menyatakan bahawa perayu pertama yang berada dalam bilik itu pada masa tersebut telah mengugut PW19 untuk tidak melaporkan perkara itu kepada polis. Rakan perayu ('PW10') yang telah memasuki premis perayu pertama pada masa matan untuk minum arak juga mendakwa telah melihat mayat terbaring di premis perayu. PW10 juga memberi keterangan bahawa dia telah melihat perayu pertama memegang pisau, manakala perayu ketiga memegang parang. Pisau dan parang itu telah ditemui oleh polis berdasarkan maklumat yang diberikan kepada mereka oleh perayu pertama. Pendakwaan berhujah bahawa ia telah membuktikan bahawa perayu pertama telah memegang pisau dan perayu ketiga memegang parang semasa kehadiran perayu-perayu kedua dan keempat, manakala semua empat perayu itu dekat dengan si mati, yang terbaring atas lantai dengan kecederaan di kepala. Hakim perbicaraan telah membuat penemuan bahawa mayat yang dikerat enam bahagian itu milik si mati dan bahawa berdasarkan keterangan pendakwaan telah membuktikan kes prima facie terhadap keempat-empat perayu itu. Keempat-empat perayu itu menafikan apa-apa penglibatan dalam kematian si mati tetapi hakim perbicaraan mendapati bahawa pembelaan tidak

menimbulkan apa-apa keraguan munasabah dalam kes pendakwaan. Berikutan itu keempat-empat perayu itu telah disabit dan dihukum mati. Rayuan-rayuan mereka telah ditolak oleh Mahkamah Rayuan dan justeru rayuan-rayuan ini. Perayu-perayu berhujah, antara lain, bahawa identiti si mati sebagaimana pertuduhan tidak dibuktikan, bahawa keterangan saksi-saksi utama pendakwaan tidak boleh dipercayai dan patut ditolak dan bahawa Mahkamah Rayuan telah gagal untuk meneliti isu pengecaman dan cara kawad cam dilaksanakan.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan-rayuan perayu-perayu kedua, ketiga dan keempat:

(1) Adalah undang-undang nyata bahawa mahkamah rayuan tidak akan campur tangan dengan penemuan serentak berhubung fakta mahkamah bawahan jika tiada keadaan yang istimewa. Atas keseluruhan keterangan yang dikemukakan, mahkamah bawahan adalah betul dalam penemuannya berhubung identiti si mati. Oleh itu, hujahan perayu-perayu bahawa identiti si mati sebagaimana pertuduhan yang tidak dibuktikan itu tidak mempunyai merit (lihat perenggan 45–46).

(2) Berdasarkan fakta kes ini inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 adalah tidak terpakai dan tidak patut digunakan terhadap pendakwaan kerana kegagalannya untuk mengemukakan dan memanggil Jayanthi sebagi saksi. Pegawai penyiasat telah membuat pelbagai usaha untuk mencari Jayanthi tetapi gagal. Oleh itu adalah jelas tiada niat di pihak pendakwaan untuk menyembunyikan keterangan. Dalam apa-apa keadaan, hakim perbicaraan berpendapat bahawa meskipun tanpa keterangan Jayanthi, terdapat keterangan mencukupi untuk membuktikan identiti bahagian badan yang dikatakan adalah si mati itu. Oleh itu, kegagalan untuk memanggil Jayanthi sebagai saksi tidak memudaratkan kes pendakwaan (lihat perenggan 47).

(3) Hujahan perayu-perayu bahawa hakim perbicaraan telah terkhilaf dalam membenarkan PW10 dan PW19 untuk mengingatkan semula ingatan mereka dengan merujuk kepada penyataan-penyataan masing-masing di bawah s 112 Kanun Tatacara Jenayah adalah tanpa merit. Tiada peraturan am bahawa seorang saksi dibenarkan mengingat semula apabila ingatannya pudar. Adalah dalam budi bicara hakim perbicaraan untuk membenarkan saksi itu mengingat semula ingatannya. Adalah kewajipan hakim perbicaraan untuk memastikan bahawa mahkamah tidak dinafikan dengan testimoni dan maklumat penuh, yang mana ia patut ada bagi tujuan melaksanakan keadilan. Selanjutnya PW10 dan PW19 telah memberikan keterangan setelah tempoh luput lima tahun selepas kejadian itu berlaku (lihat perenggan 51, 62 & 67).

(4) Berhubung isu bercanggahan dalam keterangan PW10 dan PW19, hakim perbicaraan telah meneliti dengan berhati-hati keterangan dua

saksi itu sebelum menerima bahagian keterangan mereka yang konsisten dengan penyataan mereka kepada polis. Adalah undang-undang nyata bahawa jika terdapat percanggahan dalam testimoni saksi, ini tidak semestinya menjadikannya saksi yang tidak boleh dipercayai atau membuatkan keseluruhan keterangannya tidak boleh diterima. Sebaliknya, ia adalah kewajipan mahkamah untuk menyaring keterangan dan memastikan bahagian keterangan yang menuduh tertuduh boleh diterima. Oleh itu, hakim perbicaraan tidak terkhilaf dalam menerima bahagian-bahagian keterangan PW10 dan PW19 (lihat perenggan 70–71).

(5) Pegawai polis bertugas yang menjalankan kawad cam telah menenderkan laporan-laporan di mahkamah, yang menunjukkan bahawa dia telah mematuhi arahan-arahan di bawah 'IGSO' berkaitan ketinggian, umur, bangsa dan penampilan peserta-peserta yang yang menyertai kawad cam itu. Selanjutnya, pegawai polis tidak dicabar dengan pembelaan berhubung isu ini apabila dia diperiksa balas. Oleh itu, berdasarkan keterangan sedia ada ia adalah jelas bahawa kawad cam itu telah dijalankan dengan betul dan tiada kekeliruan berhubung pengenalan perayu-perayu kedua, ketiga dan keempat (lihat perenggan 72 & 76).

(6) Berhubung perayu pertama, adalah jelas bahawa keterangan mengikut keadaan hanya boleh menimbulkan satu kesimpulan, iaitu bahawa ia adalah perayu pertama yang telah menyebabkan kematian si mati. Keterangan telah membuktikan bahawa si mati telah dilihat kali terakhir di syarikat perayu pertama di tempatnya dan bahawa pisau dan parang yang dijumpai oleh polis berdasarkan maklumat yang diberikan oleh perayu pertama kepada polis. Selanjutnya, hakim perbicaraan adalah betul kerana menolak pembelaan perayu pertama (lihat perenggan 82 & 85).

(7) Di akhir kes pendakwaan, tiada keterangan mengikut keadaan yang mencukupi untuk membuktikan bahawa perayu-perayu kedua, ketiga dan keempat berada di tempat kejadian jenayah sebagai sekutu-sekutu perayu pertama. Oleh kerana pendakwaan telah gagal membuktikan kes prima facie terhadap perayu-perayu kedua, ketiga dan keempat di akhir kes pendakwaan berdasarkan penilaian maksimum keterangan, pembelaan mereka tidak patut dipanggil (lihat perenggan 86–87).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1461–1466.

For cases on statements, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5763–5770.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] CLJ (Rep) 241, SC (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Lau Pak Ngan v R [1966] Crim LR 443, SC (refd)
Lim Hong Yap v PP [1978] 1 MLJ 154 (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Moomin bin Seman v PP [1993] 3 MLJ 282, HC (refd)
Muniandy a/l Subramaniam v PP [2006] 6 MLJ 623, CA (refd)
Om Prakash v State AIR 1956 All 241, CA (refd)
R v Richardson [1971] 2 All ER 773, CA (refd)
R v Turnbull and others [1976] 3 All ER 549, CA (refd)
Tua Kin Ling v PP [1970] 2 MLJ 61 (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yuen Chun Yii v PP [1997] 3 SLR 57, HC (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 ss 60(1)(b), 61, 114(g), 154, 159, 161, 162
Evidence Act [IND] s 159
Penal Code ss 34, 302

Appeal from: Appeal Nos B-05–176 of 2010, B-05–177 of 2010, B-05–175 of 2010 and B-05–174 of 2010 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) in case No 315 and No 317 for the appellants.
K Viknesvaran (Viknes, Ratna & Co) in case No 314 and No 316 for the appellants.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

[1] All the four appellants were charged in the High Court at Shah Alam for the offence of murder under s 302 of the Penal Code read together with s 34 of the same code. They, together with three other persons were alleged to have committed the murder of one Manivanan s/o Vellaysamy (No passport E 2068544) between 9 August 2004 and 10 August 2004 at No 136, Jalan Pandan 1, Pandan Jaya, Ampang Jaya, Selangor Darul Ehsan.

[2] They were found guilty of the offence as charged, convicted and sentenced to death. Their appeals to the Court of Appeal were dismissed and they now appeal to this court.

[3] For the purpose of this judgment, the appellant in No 05–315–11 of 2011(B), that is Mainthan s/o Arumugam will be referred to as the first accused, the appellant in No 05–317–11 of 2011(B), that is Yuganathan s/o Tharumaputrintar will be referred to as the second accused, the appellant in No 05–314–11 of 2011(B), that is Adiswaran s/o Tharumaputrintar will be referred to as the third accused and the appellant in No 05–316–11 of 2011(B), that is A Param Sivam s/o K Alagan will be referred to as the fourth accused.

Case for the prosecution

[4] Manivanan s/o Vellaysamy was an Indian National holding Indian Passport No E 2068544. At the material time, he worked with Muniandy s/o Nadeson ('PW9'). Manivanan ran away with PW9's sister-in-law, Jayanthi d/o Vadivelloo. About three weeks after their disappearance PW9 was informed by his friend, S Peter Thomas s/o Savarinayagam, that Manivanan and Jayanthi were seen in a shop in Ampang Tasek or Ampang Campuran.

[5] Upon receiving this information PW9 and the first accused proceeded to the said shop. Both the deceased and Jayanthi were brought back in PW9's motorcar. The deceased was dropped at the first accused's house, while Jayanthi was brought back to PW9's house. PW9 came to know about the deceased's death when he was arrested by the police.

[6] PW10, Giva s/o Govindan, testified that in the evening of 9 August 2004 he went to the first accused's house to send a wedding invitation card at Jalan Pandan Jaya, Selangor. He went to the store behind the house. When the door of the store was opened he saw a few persons drinking. Among them were the four accused. At first he said he only saw the bottles of liquor on the floor in the store. After his attention was drawn to his statement under s 112 of the Criminal Procedure Code, he said he saw a male person lying in a room behind the workshop, whose head was bleeding. He also saw the first accused holding a knife and the third accused holding a *parang*. PW10 also saw the second accused and the fourth accused there.

[7] PW19 ('Lai Tai Pin') rented part of the building in Pandan Jaya from the first accused about 1 1/2 years before the month of August 2004 and operated his motorcycle workshop at the premises. According to PW19, the other part of the premises was used by the first accused to keep scrap metal. He stayed there as well as in a house at Peel Road.

[8] On 9 August 2004 at about 8.30pm while he was in his workshop PW19 heard some noises from the first accused's store for about ten minutes. At about 9pm he went out through the backdoor of his workshop to go to the toilet. On his way back from the toilet to his workshop he saw the first accused in his

office as the door to the store was then open. He also saw a naked body whose head was smashed and covered with blood lying on the floor. He then went back to his workshop.

[9] According to PW19, about five minutes later the first accused asked him to go to the first accused's store where he saw a body lying on the floor. The first accused pointed a knife to his neck and warned him not to inform the police.

[10] On 10 August 2004 burnt human body parts consisting of a head and a pair of arms were found at Jalan Mengkudu off Jalan Ampang. These body parts were sent to the pathologist ('PW7') for autopsy. Jayanthi identified these body parts to PW7 as Manivanan based on the rings on his fingers and colourful strings tied to the hand which Jayanthi claimed was given by her to Manivanan.

[11] Based on the postmortem carried out on the body parts PW7 was of the opinion that the cause of death was multiple slash wounds to the head. The DNA carried out on the bone specimens of the head, right and left humerus confirmed that the head and the pair of arms belonged to one and the same person.

[12] From the evidence of PW15, the fingerprint expert, who was tasked with ascertaining the fingerprint of the deceased by adopting the comparative approach between the specimen obtained from the body parts and the criminal records at Bukit Aman, PW15's finding was that the fingerprint matched that of Indian national by the name of Kalidash s/o Arumugam who had a criminal record No 1567696.

[13] A few days later after the discovery of the head and limbs the first accused was arrested with a few others, including Jayanthi.

[14] On 15 August 2004 based on information given by the first accused, C/Insp Mohd Noah ('PW8') recovered a *parang* and a knife from a drain near a second hand shop at Jalan Pandan Indah, Kuala Lumpur. From a nearby sewerage tank at Pandan Jaya PW8 recovered body parts consisting of a pair of lower limbs and a white plastic bag containing a human torso. These body parts were later sent to PW7 for an autopsy.

CASE FOR THE DEFENCE

[15] The first accused denied having caused the death of anyone. He knew the deceased. He did see the deceased with Jayanthi on 9 August 2004. After seeing them he brought them together with PW9 back to Pandan Indah, Kuala

Lumpur. After that PW9 took the deceased and Jayanthi away. Later when the first accused asked PW9 about the deceased PW9 told him that he had left the deceased near a temple. According to the first accused PW9 did that because he wanted to avoid unnecessary problems as the deceased had a police record.

[16] The first accused claimed that the person whom PW19 saw at his premises on 9 August 2004 was one Devadas. Devadas was a drug addict. He was brought there by the second accused as the first accused wanted to find out whether Devadas was the person who stole certain items from the first accused's premises and PW19's workshop. Devadas was beaten with rattan and iron because he refused to admit. The first accused claimed that PW19 also beat Devadas. That caused injuries to Devadas' head. Devadas was later sent to the hospital by the third accused's sister and brother-in-law for treatment.

[17] The first accused said the knife and the *parang* recovered did not belong to him. He knew where the knife and the *parang* were recovered by the police as he witnessed the police recovering them in the drain in front of his premises.

[18] The first accused also testified that the police took him to a place where the police recovered the lower limbs and a white plastic bag containing human torso. He denied giving any information to the police relating to the knife, *parang* and the body parts.

[19] The second accused testified that he worked for the first accused as a lorry driver about one year before his arrest. He denied that he was involved in the murder of the deceased.

[20] According to the second accused on 9 August 2004 at about 6pm he went back to the first accused's store from Sg Besi. At that time the first, third accused and three other persons were in the store drinking liquor. He did not join them.

[21] At about 7pm he went to the first accused's office to give him the key to the store. The first accused asked him to find Devadas and bring him to the store. He found Devadas and brought Devadas to see the first accused. He then went home and did not go back to the store again that night.

[22] The third accused testified that he too worked for the first accused. On 9 August 2004 he went to Ampang Tasek with PW9 and the first accused on his motorcycle. He saw a woman and an Indian man getting into the car driven by the first accused. They went back to the first accused's store.

[23] The first accused later came to the shop. He saw the Indian man in the

temple after PW9 left the place. According to the third accused, the first accused and his other workers, namely, Baitumalai, Sivachandaran and Glen went to the temple to see the Indian man. After that Baitumalai, Sivachandran and Glen left the temple with the Indian man on two motorcycles. He did not see the Indian man after that.

[24] The third accused confirmed that there was a drinking session that evening in the store. He also confirmed the second accused's testimony about Devadas, that the second accused brought Devadas to the store after which the second accused left.

[25] According to the third accused initially only the first accused and PW19 beat Devadas with a rattan stick inside the first accused's office because Devadas refused to admit to stealing goods from the first accused's store. Later, the third accused and the first accused beat Devadas with a rattan stick and iron and a bottle. Devadas was subsequently sent to the hospital by the third accused's sister and brother-in-law.

[26] He denied holding a knife that evening in the first accused's store. He also did not see any *parang* that evening. He also denied injuring any other person other than Devadas. He also denied killing an Indian man.

[27] The fourth accused testified that on 9 August 2004 he went to the first accused's store at about 6pm to celebrate the birthday of one of the first accused's workers. At the first accused's store they consumed liquor. He did not go into the first accused's office. He heard noises from the first accused's office. When he enquired about the noise from the first accused's office he was told that the first accused was beating a thief inside the office.

[28] According to the fourth accused, PW10 came to the store that evening while they were drinking. PW10 joined them and he (PW10) was there for about half an hour. The fourth accused left the first accused's store together with PW10 after 9pm.

[29] DW5 (John Francis), the brother-in-law of the second and the third accused, testified that on 9 August 2004 at about 10pm the third accused came to his house and asked him to send Devadas to the hospital because Devadas was beaten by the third accused and his friends. DW5 sent Devadas to Kuala Lumpur General Hospital that evening. After Devadas was given medical treatment DW5 sent Devadas back to his house.

A FINDINGS OF THE HIGH COURT

[30] Having perused the evidence adduced by the prosecution with care the learned trial judge, at the close of the case for the prosecution, made a finding that the dead body cut into six parts belonged to Manivanan s/o Vellaysamy who was also known as Kalidash s/o Arumugam. The judge also made a finding that the four accused persons acted with common intention to cause the death of Manivanan s/o Vellaysamy. The learned trial judge therefore found at the close of the case for the prosecution that a prima facie case had been made up against all of the four accused of the offence charged.

[31] With regard to the defence case the learned trial judge ruled that the defence of all the four accused was an afterthought and mere concoctions. The defence did not raise any reasonable doubt in the prosecution case. Accordingly the learned trial judge concluded that the prosecution had proved its case against all the four accused beyond reasonable doubt.

FINDING OF THE COURT OF APPEAL

[32] Before the Court of Appeal the four accused persons raised two main grounds in their appeals. Firstly, it was contended that the prosecution's evidence had not proved the ingredients of the offence of murder; secondly, that the learned trial judge erred in admitting inadmissible evidence. The appeal by the four accused was dismissed by the Court of Appeal as it did not find any error in the learned trial judge's findings and conclusion nor any flaw in her application of the legal principles.

THE APPEAL

[33] Before us Mr Hisyam Teh Poh Teik, learned counsel for the first and second accused, canvassed two main grounds for their appeals, namely:

(a) the identity of the deceased as per the charge had not been proven; and

(b) the prosecution's key witnesses namely, PW10 and PW19, were unreliable and their evidence ought to be rejected.

[34] Learned counsel for the third and fourth accused, Mr K Viknesvaran, raised the following four main issues:

(a) whether the prosecution had established the ingredients of the offence and whether the third and fourth accused were involved;

(b) the effect of non-calling of Jayanthi as a witness;

(c) whether the Court of Appeal had failed to appreciate the issue of identification; and

(d) the manner in which the identification parades had been carried out.

[35] Ground (a) of the first and the second accused's appeal and ground (a) and (b) of the third and the fourth accused's appeals overlap and will be dealt with together. Mr Hisyam submitted that the prosecution failed to prove that the identity of the body parts was in fact Manivanan for the following reasons. Firstly, Jayanthi, who was the best person to establish the deceased's identity, could not be called by the prosecution to give evidence. PW7's evidence that Jayanthi identified the deceased as Manivanan on 11 August 2004 at about 10 am in the hospital's mortuary in his presence was held to be hearsay and inadmissible by the learned trial judge.

[36] Secondly, the other evidence could not support the identity of the body parts recovered to be that of Manivanan s/o Vellaysamy. According to Mr Hisham, PW9 and PW20 were not brought to the mortuary to identify the deceased. PW9 knew one Manivanan as one of his workers but this did not mean the body parts recovered was Manivanan.

[37] Thirdly, PW15 who made the fingerprint comparison made a finding that the sample fingerprint taken from the deceased matched to that of one Kalidash s/o Arumugam, an Indian national who had a criminal record No 1567696. The passport given by Jayanthi was Manivanan's not Kalidash. There was no evidence that Kalidash and Manivanan was one and the same person.

[38] Fourthly, the DNA analysis of the specimen revealed two different identities. PW7 also confirmed that the DNA of the abdomen differed from that of the head and hands. In fact, PW7 conceded that it was difficult to determine the identity of the deceased.

[39] On the same issue, Mr Viknesvaran further submitted that the Court of Appeal had erred in finding that Manivanan was Kalidash as there was no evidence to verify that Kalidash was Manivanan. It was also submitted that since Jayanthi was a material witness in this case, the failure to call her would give rise to an adverse inference under s 114(g) of the Evidence Act 1950. PW9, the brother-in-law of Jayanthi, stated in his evidence that Jayanthi was in Penang.

[40] Learned deputy public prosecutor submitted that the evidence of PW7 on what was said by Jayanthi to him can be accepted under s 61 of the Evidence

Act 1950. In support of this proposition the learned deputy public prosecutor cited the decision of the Court of Appeal in *Muniandy a/l Subramaniam v Public Prosecutor* [2006] 6 MLJ 623.

[41] In *Muniandy*'s case the Court of Appeal, at p 639 observed:

> PW7's evidence in relation to the above is not hearsay and is admissible as it was proposed to establish the fact that the statement, ie that the appellant was in the said residence, was made and not the truth of the statement. In the oft cited Privy Council case of *Subramaniam v Public Prosecutor* [1956] MLJ 220, which dealt with a similar circumstance, Mr LMD De Silva said (at p 222):
>
> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.
>
> In the instant appeal, the learned trial judge admitted the evidence in relation to the conversation between PW7 and the deceased pursuant to s 60(1)(b) of the Evidence Act 1950 which reads:
>
> (1) Oral evidence shall in all cases whatever be direct, that is to say
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;.

[42] In the instant appeal PW7's relevant evidence is as follows (at p 43 of the appeal record):

> Pada 11.8.2004 jam lebih kurang 10.00 pagi, saya berada di bilik mayat Hospital Universiti Kebangsaan Malaysia melakukan bedah siasat ke atas kepala dan tangan simati yang telah dikenalpasti kepada saya oleh ASP Mohamad bin Hj Laham No Polis G/9855 dan juga seorang wanita India yang bernama Jayanthi d/o Vadiveloo I.C. 800224075462 di mana beliau telah mengenal pasti jasad tersebut sebagai Mani Vanan Vellay Samy dengan passport India E2068544.
>
> Pada proses pengecaman Jayanthi telah mengenal pasti satu cincin pada jari keempat tangan kanan simati bertulis perkataan 'love'. Selain daripada itu terdapat satu lagi cincin dengan 4 baris selari pada jari kelima tangan kanan simati. Kedua-dua cincin itu adalah pemberitan Jayanthi kepada Mani Vanan semasa beliau masih hidup. Terdapat satu tali (string) berbagai warna pada bahagian hasta kanan di pergelangan tangan kanan. Saya baca dari laporan yang saya telah sediakan setelah saya menjalankan post mortem.

[43] From our understanding, the purpose of adducing the evidence of the

statement of Jayanthi made to PW7 was to establish the truth that the body parts were that of the deceased. The object was not to establish the fact that it was made. Such evidence is therefore hearsay and inadmissible and was rightly rejected by the learned trial judge. As such we are of the view that the Court of Appeal had erred when it admitted that piece of evidence under s 60(1)(b) of the Evidence Act 1950.

[44] The learned trial judge, after evaluating the evidence of PW7, PW9, PW15 and PW18, concluded that the deceased was Manivanan s/o Vellaysamy and that Manivanan s/o Vellaysamy and Kalidash s/o Arumugam was one and the same person. At paras 30, 31 and 32 of her judgment the learned trial judge said:

> 30 Bagi saya, setelah saya meneliti keterangan SP21 itu, adalah jelas bahawa keterangan SP7 mengenai perbezaan profil DNA bagi jasad set kedua berbanding dengan profil DNA bagi jasad set pertama adalah disebabkan oleh bakteria dan organisma yang lain yang boleh menukar dan menyebabkan 'degeneration' DNA yang diambil itu setelah jasad set kedua itu terendam dalam air tanah dan najis dalam loji kumbahan itu adalah sangat bermunasabah dan sebenarnya tidak bercanggah dengan keterangan SP21, yang juga telah memberi alasan mengapa beliau (SP21) tidak dapat profil DNA bagi tulang 'N(B)' itu ialah kerana tulang itu telah membusuk atau rosak. Oleh yang demikian saya menerima keterangan SP7 bahawa jasad set pertama dan jasad set kedua adalah datangnya daripada orang yang sama setelah mengambil kira bukti-bukti lain dan sebagaimana yang saya telah memperincikan sebelum ini.
>
> 31 Adalah juga dapatan fakta saya bahawa berdasarkan keterangan SP7, SP15, SP9 dan SP18, Manivanan Vellaysamy itu juga dikenali sebagai Kalidash a/l Arumugam rekod jenayah No 1567696. Mengikut keterangan SP15 beliau telah menerima permohonan (P22) untuk membuat perbandingan cap jari daripada SP18 pada 12.8.2004 (cap jari tangan kanan Si Mati telah diambil oleh SP7 sebelum itu). Hasil pemeriksaan dan perbandingan ke atas cap jari itu beliau dapat kesan ianya atas nama Kalidash a/l Arumugam, rekod jenayah No 1567696, seorang warga negara India (P23). Bahawa Kalidash a/l Arumugam telah dituduh dan dihukum di bawah seksyen 224 Kanun Keseksaan pada 2 November 2001.
>
> 32 Berdasarkan apa yang saya telah nyatakan di atas, saya mendapati pihak pendakwaan telah berjaya membuktikan identiti Si Mati sebagai Manivanan Vellaysamy Passport India E2068544 yang juga adalah dikenali sebagai Kalidash a/l Arumugam dan bahawa jasad beliaulah yang dijumpai terpotong kepada 6 bahagian, iaitu jasad set pertama dan set kedua, dan dengan itu terbuktilah kematian beliau.

[45] It is pertinent to note that the Court of Appeal agreed with the findings and conclusion of the learned trial judge that the deceased was Manivanan s/o Vellaysamy and that Manivanan s/o Vellaysamy and Kalidash s/o Arumugam

was one and the same person. It is trite that an appellate court does not interfere with the concurrent findings of fact of the courts below in the absence of very special circumstances.

[46] On the totality of the evidence adduced we find the finding of the courts below as to the identity of the deceased to be correct. We therefore find that both counsel's submission on this point to be devoid of any merit.

[47] As regards the issue of whether an adverse inference ought to be invoked against the prosecution for failure to produce and call Jayanthi as its witness, we are of the view that on the facts of this case s 114(g) of the Evidence Act 1950 was not applicable and should not be invoked. ASP Radzali bin Abu Hassan ('PW22'), the investigating officer, had made various efforts to trace Jayanthi including publication of a notice in a newspaper, *Tamil Namban*, but to no avail. There clearly was no intention on the part of the prosecution to suppress the evidence. Even without the evidence of Jayanthi the learned trial judge was of the view there was sufficient evidence to prove the identity of the body parts to be that of Manivanan. Thus, the failure to call Jayanthi as a witness was not fatal to the prosecution's case.

[48] We now deal with the second issue raised by Mr Hisyam relating to the credibility of the prosecution's main witnesses, PW10 and PW19. It was contended that their evidence should have been rejected by the learned trial judge on the ground that their evidence were marred by major contradictions and discrepancies.

[49] In the earlier part of his evidence PW10 said that in the evening he went to the accused's store and he did not see anything except for the liquor's bottles. However, after his attention was referred to his statement under s 112 of the Criminal Procedure Code, he said there was a naked man lying in a room behind the motor workshop. When PW10 was asked to explain this contradiction he said that what was said in his s 112 statement was the truth; he saw the first accused holding a knife whilst the third accused was holding a *parang*.

[50] With regard to these contradictions the learned trial judge said:

> Keterangan SP10 adalah antara keterangan yang terpenting dalam kes ini yang dapat menentukan atau tidak penglibatan keempat-empat Tertuduh itu dalam pembunuhan Si Mati. Saya dapati keterangan SP10 memang ada banyak percanggahan sesamanya.
>
> Saya berpendapat bahawa di banyak tempat percanggahan itu disengajakan kerana SP10 takut memberi keterangan yang sebenarnya. Namun saya telah menelitikan keterangan SP10 dan setelah beberapa nasihat diberi oleh saya serta beliau

dibenarkan merujuk kepada kenyataannya yang diberi kepada pihak polis sebagai menyegarkan ingatannya, saya dapati saya boleh menerima sebahagian keterangannya sebagai keterangan yang benar. Keterangan SP10 yang diterima oleh saya adalah seperti berikut.

[51] Mr Hisyam submitted that the learned trial judge had erred in allowing PW10 to refresh his memory. Refreshing memory under s 159 of the Evidence Act 1950 was only permissible when the witness is unable to speak from his memory. In support of that proposition Mr Hisyam cited the cases of *Yuen Chun Yii v Public Prosecutor* [1997] 3 SLR 57 and *Moomin bin Seman v Public Prosecutor* [1993] 3 MLJ 282. In this regard it was contended that the correct procedure that should have been adopted was for the prosecution to cross-examine PW10 pursuant to s 154 of the Evidence Act 1950.

[52] It was further submitted that there were glaring contradictions between PW10's oral evidence and his s 112 statement. The learned trial judge did not ask PW10 to explain the contradictions and then make a ruling whether the explanation was acceptable or otherwise. What the learned trial judge did in this case was to sieve through PW10's evidence and accepted part of it.

[53] Further, Mr Hisyam submitted that as PW10 was also at the scene and had also been arrested, he had every reason to exculpate himself to secure a release. His evidence therefore ought to have been rejected by the learned trial judge.

[54] With regard to PW19's evidence, it was contended that there were material inconsistencies in his evidence. Earlier in his evidence PW19 testified that he saw the first accused in his (the first accused) store at about 9pm. He then said he did not see the first accused but he only heard the first accused's voice from the store. Later, when he was allowed to refresh his memory by referring to his statement made to the police he changed his story to say that he saw the first accused and a body inside the office of the store. Similarly, it was argued that the learned trial judge had adopted a wrong procedure in allowing PW19 to refresh his memory as there was no evidence at all that PW19 was unable to remember the incident and that he required reference to his police statement.

[55] Mr Hisyam also highlighted two main contradictions between the evidence of PW10 and PW19. Firstly, on the number of persons in the store. According to PW10 there was between 20 to 30 persons, each of them holding bottles in their hands whereas PW19 said there were only two or three persons there. Secondly, PW10 said he saw a body there and he was not sure whether the person lying down was drunk, naked or bleeding. PW19, on the other hand, said the body was naked, its head chopped off, leaving only the torso.

[56] It was also submitted that the subsequent conduct of PW19 did not lend credence to his version of the events. After witnessing a dead body whose head was severed from the body, and threatened with death or injury by the first accused, his reaction was to go to his room to sleep as if nothing had happened.

[57] In relation to this, Mr Viknesvaran submitted that there was no evidence by any of the prosecution's witnesses that the murder took place at Kedai Bengkel Motosikal No 136, Jalan Utama, Jalan Pandan 1, Pandan Jaya as stated in the charge as there was no blood of the deceased recovered at that place. Further, there was no evidence of any DNA samples matching that of the third and fourth accused.

[58] The statutory provision relating to refreshing a witness's memory is s 159 of the Evidence Act 1950 which provides as follows:

> (1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

[59] In *Yuen Chun Yii v Public Prosecutor* Yong Pung How CJ made the following observation at p 63 of the report:

> 21 When a party examining his own witness attempts to invoke s 161 EA to refresh the memory of that witness, the basic premise, apart from the conditions set out in s 161, is that his memory has faded, causing him to forget certain details about the evidence he intends to give. The witness is allowed to refresh his memory because a witness should not suffer from an unintended mistake, and may explain an inconsistency: *Halliday v Holgate* 17 LT 18. Where he testifies to facts mentioned in the document referred to under s 161, provided he accepts that the facts were correctly recorded, these facts become his testimony: s 162 EA.
>
> 22 In the present case, Chia had never said that he had suffered a lapse of memory. Before me, the DPP confirmed that he had wanted to refresh Chia's memory because Chia had said something potentially inconsistent with his CPIB statement, namely, that he 'did not tell the (appellant) anything about his role in respect of the transfer of the units'. This was perceived to be in conflict with the prosecution's case as reflected in 25 of Chia's CPIB statement, wherein Chia had stated that he had told the appellant that the money was given for his assistance in the matter.
>
> 23 There must be a demonstrated need for the witness to refer to a memory-refreshing document, and it would not be proper to grant leave to refer to such a document simply because a request was made by the prosecution: see *Hetherington v Brooks* [1963] SASR 321. No reasons were apparently given as to why Chia's memory had to be refreshed. At any rate, no reasons appear from the record, and it would seem that the district judge acceded unquestioningly to the DPP's request.

[60] In *Moomin bin Seman v Public Prosecutor* the High Court had the occasion to consider s 159 of the Evidence Act 1950. At p 287 of the report Richard Talalla J observed:

> A witness testifying in court should initially speak from memory, unaided, and it is only when the witness finds that that cannot be done, recourse is sought to the writing. Otherwise the writing may be relied on in place of that expressed from memory and the two may not at the time of testifying be the same. See the observation of Winslow J in *Sebastian v PP*. Indeed, such a course has been recognized by the legislature as manifested by ss 159–161 of the Act.
>
> The statutory provisions for refreshing memory are by reference to s 159, conditioned. The first condition is that the writing by which the memory of a witness is to be refreshed must have been made by the witness himself or if by any other person then the writing must have been read by the witness and at the time of such reading known by the witness to be correct. A second condition is that the writing when made, or read and known as the case may be had to be so done at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory notwithstanding that the first condition may have been met. A witness cannot so refresh his memory by right. It is within the discretion of the court whether or not to allow it. The discretion of course will be exercised upon a consideration of all the facts and circumstances at a particular time pertaining.
>
> It will be seen by reference to s 159(1) and (2) of the Act that the writing is of a transaction concerning which the witness is questioned. As I see it, the statutory safeguards exist to ensure that the writing is a true record of the perception of the witness of a thing the witness is to testify to and not a distortion of the truth contrived by the questioner or others having an interest in the witness not telling the truth.

[61] In *Moomin*'s case Richard Talalla J referred to the decision of the Supreme Court of Hong Kong in *Lau Pak Ngan v R* [1966] Crim LR 443 and summarised the observations made by Hogan CJ as follows:

> (1) The ideal might well be that witnesses should be able, without aid of reference to statements or notes made at a time closer to the events in questions, to recall with clarity and accuracy the details of earlier events but witnesses are human beings and, as such, apt to forget the details of events as time goes by. If a witness is denied reasonable opportunities of refreshing his memory in the way ordinary men of affairs refresh theirs, a danger must arise that the courts will be unnecessarily deprived of the full testimony and information which they should have in order to do justice. There is, we think, a greater danger of this than of encouraging or facilitating untruthful testimony by permitting access to earlier statements.
>
> (2) One must, of course, recognise that a witness may not wish to refresh his memory and if, in such circumstances, any pressure is used to make him do so, allegations of coaching may be difficult to refute. Moreover, we think it

A is undesirable that statements of witnesses should be read over to them in each other's company when each is able to hear what the other has said and we would deprecate such a practice.

(3) If a police officer — or indeed anyone connected with a case — enters unnecessarily into conversation with a witness as to his or her evidence B during an adjournment of the witness's testimony, the officer at once exposes himself and the witness to the suggestion that the evidence subsequently given is in some way affected by such conversation and possibly distorted so as to present a picture more favourable to one side.

(4) Anything in the nature of coaching a witness in the evidence he is expected C to give would be most reprehensible and would call for condemnation.'

[62] In *R v Richardson* [1971] 2 All ER 773, Sachs LJ, in delivering the judgment of the Court of Appeal, at pp 776–777 of the report, observed as follows: D

> Indeed the only case which has a direct bearing on this issue is one which was decided not in this country but on appeal in the Supreme Court of Hong Kong in 1966: *Lau Pak Ngam v R*, which is compactly reported. In the view of each member of this court it contains some sage observations, two of which are apt to be quoted. E One of them is:
>
> Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question. F

The other:

> Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses. G

With those views this court agrees. It is true that by the practice of the courts of this country a line is drawn at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory except by a document which, to quote the words of *Phipson on Evidence*, 'must H have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in his memory'. (Incidentally, that definition does provide a measure of elasticity and should not be taken to confine witnesses to an over-short period.) It is moreover a practice which the courts can enforce, when a witness is in the box the court can see that he complies with that I practice. The courts, however, must take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong if several witnesses

were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice.

[63] In *Lim Hong Yap v Public Prosecutor* [1978] 1 MLJ 154, the Singapore Court of Criminal Appeal considered and applied the judgment in *Richardson*'s case and held that there can be no general rule that witnesses may not before trial see their statements made at some period reasonable close to the time of the event.

[64] In *Sarkar's Law of Evidence*, (16th Ed 2006) at p 2465 the following commentary was made on s 159 of the Indian Evidence Act:

> Ordinarily a witness deposes to facts from the recollection but memory fades and it is therefore very necessary that he should be allowed to assist his memory by looking at documents containing an account of them if there be any. This is known as refreshing memory. A reference to the written memoranda has the effect of reviving in his mind a recollection of the facts recorded therein. A witness may through lapse of memory, be honestly making a statement contrary to what is contained in the written memorandum. He is allowed to refresh his memory because a witness should not suffer from a mistake, and may explain an inconsistency [per Montagus Smith J, in *Halliday v Holgate* 17 LT 18] …

[65] Turning to the facts of the instant case, the learned trial judge allowed the prosecution to refer PW10 and PW19 to their statements made to the police on the application by the learned deputy public prosecutor. As can be seen from the notes of proceedings the application was made when the oral testimony of the PW10 and PW19 contradicted their respective statement made to the police.

[66] The main complaint by Mr Hisyam against the decision taken by the learned trial judge in allowing these two witnesses to refresh their memory was that it was allowed not because the witnesses were unable to speak from memory. PW10 was allowed to refresh his memory because he was in a state of fear, and as for PW19, there was no evidence that he was unable to remember the incident or that he required reference to his previous statement.

[67] Looking at the cases mentioned earlier we are of the view that there can be no general rule that a witness is to be allowed to refresh his memory only when his memory has faded. It is within the trial court's discretion to allow a

witness to refresh his memory. Cases show that witnesses were allowed to be shown their statements even before the trial. It is the duty of the trial judge to see that the court will not be deprived of the full testimony and information which it should have in order to do justice. In fact, PW19 said in his evidence (p 131 of the appeal record), after referring to his statement to the police, that he could not remember what he had said in his statement. It is also important to take into consideration the fact that both PW10 and PW19 gave evidence about five years after the incident, ie in 2009 whereas the offence was committed in 2004. Surely after a lapse of five years PW10 and PW19 could not be expected to remember in detail what had taken place. We are therefore of the view that the learned trial judge had properly exercised her discretion in allowing the prosecution to refresh the memory of these two witnesses, PW10 and PW19.

[68] On the issue of the contradictions in the evidence of PW10 and PW19, the learned trial judge had carefully considered them and decided to accept part of their evidence which were consistent with the statements given to the police. The learned trial judge accepted PW10's evidence that he ('PW10') went to the first accused's store at about 9.30pm to 10pm on 9 August 2004 and of all of the four accused being there. PW10 saw the first accused holding a knife and the third accused holding a *parang*. PW10 also saw a naked Indian man lying in a room behind the motor workshop whose head was bleeding.

[69] With regard to PW19's evidence, the learned trial judge accepted, among others, the evidence that on 9 August 2004 at about 9pm of the first accused being inside his (the first accused) office and a naked man lying on the floor whose head was severed, (p 131 of the appeal record).

[70] It is trite law that the fact that there are discrepancies in a witness's testimony does not necessarily make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness's evidence it considers true (*Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172). If a witness demonstrably were to lie on one or two points, then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinised with great care, and indeed, with suspicion. To say, however, that because a witness has been proved to be untrue on one or two points then the whole of his evidence 'must in law be rejected' is going too far and is wrong (*Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b). It is the duty of the court to sieve through the evidence and to ascertain which part of the evidence incriminating the accused could be accepted. (*Tua Kin Ling v Public Prosecutor* [1970] 2 MLJ 61).

[71] The learned trial judge, after having scrutinised with great care the

evidence of PW10 and PW19, had accepted parts of their evidence which were consistent with the statements given by them to the police. In our view the learned trial judge was entitled to do so and as this involved on assessment of the credibility of witnesses, the learned trial judge was in a better position to do so and that an appellate court ought not to interfere with such findings.

[72] On the manner the identification parades had been conducted Mr Viknesvaran submitted that they were not conducted in accordance with the procedure laid down in *R v Turnbull and others* [1976] 3 All ER 549. According to Mr Viknesvaran the requirements relating to the persons participating in the identification parades had not been complied with as there were no mention of their build nor height by the officer conducting the identification parades.

[73] From the evidence adduced, ASP Syed Mohd Azam bin Syed Ibrahim ('PW14') conducted three separate identification parades on 22 September 2004, 31 May 2005 and 9 March 2006. On 22 September 2004 the identification parade was conducted for the purpose of the identification of the second accused. The only information given by PW14 on the persons who participated in that identification parade was that all the participants were Indians, aged between 18 and 31 years old. There were ten participants excluding the second accused. PW19 could not identify the second accused but PW10 could identify the second accused as one of the persons who were drinking liquor at the first accused's store.

[74] With regard to the identification parade held on 31 May 2005, PW14's evidence was that its purpose was for the identification of the third accused and another suspect by the name of Arun s/o Maruthairajan by PW10. There were 15 participants who were Indians aged between 18 and 30 years old. PW10 identified both of them as among the persons at the first accused's store.

[75] On 9 March 2006, PW14 conducted the third identification parade for PW10 in respect of the identification of the fourth accused. There were ten participants who were Indians. PW10 identified the fourth accused as one of the persons present at the first accused's store.

[76] It is pertinent to note that in his evidence (p 100 of the appeal record) PW14 stated that all of the identification parades were conducted in accordance with the procedure. The reports on the identification parades were tendered in court as exhs P19 to P21. At the end of each report PW14 stated that he complied with the directions under 'IGSO' relating to the height, age, race and appearance of the participants who took part in the identification parades. PW14 was not challenged by the defence on this issue when he was cross-examined. It is trite that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of his testimony (see *Wong Swee*

Chin v Public Prosecutor [1981] 1 MLJ 212). The learned trial judge accepted the evidence on the identification of the second, third and fourth accused in the identification parades. PW10 testified that the first accused was his friend and known to him long before the incident.

[77] With respect, we are unable to agree with Mr Viknesvaran that the identification parades held were not in accordance with the guidelines laid down in *R v Turnbull*. On the evidence available the identification parades had been properly conducted and there was no confusion as to the identification of the second, third and fourth accused made by PW10.

[78] The other important issue in this case is the issue of common intention under s 34 of the Penal Code. All four accused were alleged to have committed the offence 'in furtherance of the common intention'. We may usefully refer to three authorities on the subject. In *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 345 (MLJ); [1987] CLJ (Rep) 241 at pp 251 and 252 (CLJ) Syed Agil Barakbah SCJ opined:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention. Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (The Supreme Court (of India) on *Criminal Law*, (1950–1960) by JK Soonavala pp 188–193).

[79] In *Om Prakash v State* AIR 1956 All 241, it was held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. The court cited as an example a person who is present at the spot as an eye witness to the offence, was to be contrasted with a person who is present as a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime, whereas the latter is guilty because he is present for the purpose of seeing that the crime is committed.

[80] In *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749 at p 764 this court opined:

It is a well established principle of law in dealing with the criminal liability under s 34 of the Penal Codethat a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v Emperor* AIR 1945 PC 118 and *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 …

[81] Learned deputy public prosecutor submitted that the prosecution had established a common intention to commit the offence of murder because it has been proved that the first accused was holding a knife, the third accused holding a *parang* in the presence of the second and the fourth accused near the deceased, who was lying down on the floor with head injuries.

[82] In respect of the first accused, we are satisfied that the circumstantial evidence gave rise to one and only conclusion that it was the first accused who caused the death of the deceased. The evidence had established as a fact that the first accused was with the deceased when he accompanied PW9 to go to Ampang Tasek/Ampang Campuran to take Jayanthi, who had ran away with the deceased, back to PW9's house. PW9 brought both Jayanthi and the deceased back and he left the deceased at the first accused's place.

[83] PW19 saw the deceased at about 3.30pm in the first accused's office. The second time he saw the deceased was at about 9.30pm in the same room. This time the deceased was lying on the floor dead, naked with a severed head. The first accused was inside the room. The first accused subsequently threatened PW19 not to report the matter to the police.

[84] PW10 saw the first accused holding a knife when he went to the first accused's place between 9.30pm and 10pm and saw the third accused holding a *parang*. He was at the place for about five to ten minutes. He joined the four accused and other persons to drink liquor there. PW10 saw a body lying in the office of the first accused's store.

[85] The knife and *parang* were recovered by the police in the drain at Jalan Pandan Indah based on the information given by the first accused to PW8.

[86] The prosecution case rested on circumstantial evidence. In our view there was insufficient circumstantial evidence, at the end of the prosecution's case, that the second to the fourth accused caused the death of the deceased in furtherance of a common intention. There was no evidence to prove that the second, third and fourth accused were present at the scene as confederates of the first accused.

[87] In our view the prosecution had failed to establish a prima case against the second, third and fourth accused at the end of the prosecution case based on a maximum evaluation of the evidence and as such their defence should not have been called.

[88] With regard to the first accused's defence we agree with the conclusion of the learned trial judge that his defence was an afterthought. The learned trial judge had given a careful consideration to the defence pertaining to the existence of Devadas but rejected the defence on the ground that it was never raised by the defence during the prosecution case, nor the issue raised to any of the prosecution witnesses during cross-examination.

[89] For the reasons given we dismiss the appeal by the first accused (Appeal No 05-315-11/2011 (B) and allow the appeals by the second, third and fourth accused (Appeal Nos 05-317-11/2011(B), No 05-314-11/2011(B) and No 05-316-11/2011(B)). The conviction and sentence of the first accused is affirmed and the convictions and sentences of the second, third and fourth accused are set aside.

First appellant's appeal dismissed and appeals of the second, third and fourth appellants allowed.

Reported by Kohila Nesan